3/21/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	DOCKET NO. VI-88-105
CARL E. HECK, JR., DIRECTOR, WESTERFELT PROPERTIES, INC.,	PROCEEDINGS TO ASSESS CIVIL PENALTY PURSUANT TO CWA §309(g), 33 U.S.C. 1319(g)
RESPONDENT	

INTERLOCUTORY ORDER GRANTING COMPLAINANT'S MOTION

FOR PARTIAL ACCELERATED DECISION

Comes now U.S. Environmental Protection Agency, Region VI (hereinafter "EPA" or "Complainant") and files, with supporting memorandum and affidavits, Motion for Partial Accelerated Decision, pursuant to 40 C.F.R. 22.20 1/, praying for a determination that Respondent Carl E. Heck, Jr., Director of Westerfelt Properties, Inc. (hereinafter "Heck" or "Respondent") has violated Section 301 of the Clean Water Act (hereinafter "CWA" or "the Act"), 33 U.S.C. 1311, and that EPA has jurisdiction to assess penalties for such violation pursuant to 309(g) of the CWA, 33 U.S.C. 1319(g).

Respondent has timely filed its Memorandum in Opposition to said Motion accompanied by Respondent's and four other affidavits, which was received by the undersigned on March 13, 1989.

By Complaint filed on August 18, 1988, Complainant, the Director of Environmental Services Division of EPA, Region VI, by authority delegated to

1/ Said Section further provides (§22.20(b)(2)) that if an accelerated decision is rendered on less than all issues . . . in the proceeding, an interlocutory order shall reflect such determination and specify the facts which appear substantially uncontroverted and the remaining issues upon which the hearing will proceed.

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him by the Administrator of the EPA and the Regional Administrator, EPA Region VI, charges that Respondent, or those acting for and on his behalf, using machinery, discharged fill material, consisting of earth material and vegetation, into the waters of the United States between September 1, 1987, and January 28, 1988, when, at all said times, continuing through August 28, 1988, the date of subject Complaint, no permit has or had been issued to him under Section 404 of the Act, 33 U.S.C. 1344, permitting such discharge, all in violation of Section 301 of the Act, 33 U.S.C. 1311. Pursuant to Section 309(g) of the Act, 33 US.C. 1319(g), subject Complaint proposes the assessment of a civil penalty against Respondent in the sum of $50,000.

On September 1, 1988, Heck filed an Answer consisting of his request for an administrative hearing. On September 13, 1988, he filed his Amended Answer to subject Complaint denying that EPA had jurisdiction for the reason that "the property in question is not wetlands" and admitting that he had subject property cleared and leveled. Said pleading further states that Respondent's inability to pay the proposed penalty will be demonstrated at said hearing.

While Heck's pleading admits that he cleared and leveled land adjacent to Bayou Grand Caillou in Terrebonne Parish, Louisiana, and that same was accomplished without a permit issued by the Army Corps of Engineers (hereinafter "COE" or "the Corps"), he denies that subject property was "navigable waters" subject to EPA jurisdiction under the Act.

On this basis, he argues that he is not required to obtain a Section 404 permit to conduct such work and that EPA thus lacks jurisdiction to assess the penalty proposed (paragraphs I and II-1, Amended Answer).

Thus, the salient issue raised by Respondent and to be here determined is whether the subject area was a "wetland" at the time it was so cleared and leveled.

Subject Motion seeks a determination that said property cleared and filled by Heck was a "navigable water" subject to federal jurisdiction under CWA; that Respondent's subject activities were not authorized by a permit and, thus, were violative of the Act and regulations here pertinent.

Upon the basis of the pleadings, the memoranda filed by the parties and the said affidavits filed with said memoranda, I make the following findings of fact and conclusions of law.

To the extent that the following findings of fact constitute conclusions of law, they are adopted as such and to the extent that the conclusions of law constitute findings of fact, they are so adopted.

Findings of Fact

1. Subject property, described as being a part of Section 79, Township 18 South, Range 18 East, Terrebonne Parish, Louisiana, is bounded on the north by St. Louis Canal, on the east by State Highway 57 and on the west by Bayou Grand Caillou.

2. Respondent admits that at all times pertinent hereto, he did and does not have a permit issued under the CWA authorizing clearing or leveling subject property or to discharge fill material consisting of earth and vegetation into the waters of the United States (Complaint, paragraph II(1) and III(1) and Answers thereto).

3. On January 28, 1988, the COE issued on site to Respondent a Cease and Desist Order after observing deposition of fill on subject property. On April 26, 1988, after a visit to the site by EPA and COE, a Cease and Desist Order was mailed to Respondent which cited, as Section 404 violations, the filling of natural tidal connections between said bayou and subject property alleged to be "the wetlands" (Complaint II, IV and V and Answer thereto).

4. EPA representatives visited subject site on June 24, 1988, and determined that portions of the development site, referred to as Phases I, II and III, were "wetland". Said Phase I is the northern portion of subject site and phase III is the southernmost portion (Complainant (hereinafter "C") Exhibit (hereinafter "EX") 33).

5. Respondent, or others acting on his behalf, using machinery, discharged fill material consisting of earth materials and vegetation onto said development site between September 1, 1987, and January 28, 1988 (Kenneth Falgout affidavit; John Bruza, Jr., affidavit, paragraphs 6 and 11).

6. Respondent submits that the penalty proposed in subject Complaint is inappropriate even if subject property was determined to be "wetlands" because the normal sanction for filling wetlands without a permit is to require the offending party to apply for an "After the Fact" permit, which was applied for by Ashland Land Partnership, owner of subject site, on May 24, 1988. Respondent further states that the COE has already granted to the Terrebonne Parish Government authority to dredge Bayou Grand Caillou adjacent to subject site and to deposit the spoil on subject property and that the result there would be identical to the work by Respondent here complained of (Respondent's Answer IV(2)).

7. 40 C.F.R. 230.41 ("Wetlands") states, in pertinent part, as follows:

> (a)(1) Wetlands consist of areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions.
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> * * *
>
> (a)(3) Wetland vegetation consists of plants that require saturated soils to survive (obligate wetland plants) as well as plants, including certain trees, that gain a competitive advantage over others because they can tolerate prolonged wet soil conditions and their competitors cannot. . . .
>
> * * *

(b) Possible loss of values: The discharge of dredged or fill material in wetlands is likely to damage or destroy habitat and adversely affect the biological productivity of wetlands ecosystems by smothering, by dewatering, by permanently flooding, or by altering substrate elevation or periodicity of water movement. . . .

8. The affidavit of John B. Bruza, Ph.D., employed as a botanist in the Surveillance and Enforcement Section of the COE, New Orleans District, states that he is familiar with subject property, has studied a Memo (C EX 24) dated January 28, 1988, prepared by R. Duke, listing the vegetation (Duke) identified on said property, and also is familiar with the wetland determination made by affiant Kirchner, dated June 30, 1988 (C EX 33), finding most of the property "filled" and most of the trees and understory cut. A total of nine (9) ditches had been dug to Bayou Grand Caillou. From his investigation, he delineated the wetlands for Phases II and III of said property (Memo, dated March 25, 1988). His wetland determination for Phase I comprises C EX 27. He prepared a vegetation list (Paragraph 9, Burza affidavit) for his wetland determination and reviewed aerial photographs (C EXs 29, 30 and 32). He found that vegetation in the uncleared portion of Phase III consisted almost exclusively of plants having a 99% probability of occurring only in wetlands. No vegetations or skeletons of dead vegetation were found that would indicate this area is ever free of standing water. Further, a predominance of obligate wetland indicator species (99% variety) were found throughout the remainder of subject property.

Soils of the property, as identified in the Soil Survey of Terrebonne Parish (C EX 44) consists of Swamp Soils (Clays and Mucky Clays - Sg) and Mahoon Silty Clay Loam (Mf). Both are hydric soils.

Positive indicators of hydrology include saturated soil on all site investigations, standing water in the area that had not been filled and

buttressed tree trunks (a morphological adaptation to standing water). Hydric soils and positive indicators of hydrology, while not prerequisites for determining COE jurisdiction, do provide additional supporting data. Review by him of aerial photography (C EX 30) indicated that subject property was tidally influenced by Bayou Grand Caillou from four (4) connections. Said aerial photographs show standing water over portions of the site.

Dr. Bruza further states (Paragraph 10) that Bayou Grand Caillou is a navigable as well as a tidal water of the United States. Documentation of same is C EX 45: "Report of Navigability of Bayou Grand Caillou." Paragraph 11 of Dr. Bruza's affidavit states that on April 26, 1988, Respondent admitted degrading a spoil levee immediately adjacent to Bayou Grand Caillou and using the material as fill to level the property. On July 21, 1988, he conducted a follow-up inspection of Phase I. Based on the numerous obligate wetland species (99% variety) that were sprouting back after having been cut during subject cleaning and filling activities, it was determined by him that Lots 1 through 7 were wetland subject to COE jurisdiction and that Lots 9 through 11 were not wetland. He concludes that most of the subject property is wetland subject to COE Section 10 and Section 404 jurisdiction.

9. The affidavit of Respondent Heck states that after a Cease and Desist Order was issued by COE on January 28, 1988 (in February, 1988), he met with representatives of COE in New Orleans - Mr. Ray Gonzales, Ms. Elizabeth Griffin and Dr. Thom Davidson - and was advised by them that COE had, previous to said Cease and Desist Order, conducted a wetlands determination of Phase I (northern-most 700 feet) and determined it to be non-wet. He maintained, on April 26, 1988, in a meeting with Dr. Bruza and Mr. Gonzales, that if Phase I

was non-wet, Phases II and III could not be wet either as similar elevations and drain patterns existed for the three tracts. Hecks denies any dredge and fill operations in Phase I prior to said Cease and Desist Order and states that any fill operation is attributable to parties unknown to him whose activities occurred many years prior to his acquisition of subject property.

Heck, at the request of the Houma-Terrebonne Parish Planning Commission, removed the levee from the bayou side in Phase III and southern half of Phase II and deposited it in non-wetlands. There was no levee at all on Phase I at the time of Heck's acquisition. There may be areas that fall within the legal definition of wetlands within Phases II and III of Heck's development, but he denies depositing any spoil or fill in those areas. He further denies that Bayou Grand Caillou is navigable or that he deposited unpermitted fill in wetlands adjacent to Bayou Grand Caillou. He refers to a letter from COE, dated July 28, 1988 (R EX 34, referred to infra), as complete fabrication. 10. Respondent EX 34 is a letter Respondent Heck received on or about July 28, 1988, from Henry R. Schorr, Chief, Operations & Readiness Division, COE, stating COE's position concerning said Phase I. The letter states, in pertinent part:

> "The initial inspection of the Phase I area was inconclusive as to the actual line of demarcation of wet/nonwetland. Although it was determined that the property was, in fact, comprised of wetland, it was difficult to establish . . . which portion was wet and to what extent."

Said letter then states that COE declined jurisdiction over Phase I pending further information; then, when Heck contended that Phase I was as wet or wetter than Phases II and III, a starting point was provided to begin a re-evaluation of said original determination. Said letter further advises that COE's decision not to accept Respondent's "After-the-Fact" application for

permit is because his violation, due to his past history, is considered by COE to be knowing, willful and repeated. Page 2 of said letter states that certain properties east of Louisiana Highway 57 were not and are not now wetlands.

11. The affidavit of Kenneth Falgout, bulldozer operator, corroborates Heck's account to the effect that, on January 28, 1988, COE employees Gonzales and Duke tied a red ribbon on the ground about 700 feet south of the St. Louis Canal and told Falgout not to work south of the red ribbon until COE conducted further study to determine if the property was wetlands.

12. The affidavit of Respondent witness Michel Claudet relates his attendance at a meeting, on October 17, 1988, chaired by Colonel Lloyd Brown of COE, where Dr. Thom Davidson is quoted as reporting that "at least parts" of Phase I were non-wet. Further, Raymond Ganzales stated that he and Ronnie Duke placed a red ribbon on the ground of subject property extending from Louisiana Highway 57 to Bayou Grand Caillou at approximately 700 feet south of the St. Louis Canal. The January 28, 1988, Cease and Desist Order was issued for the area beginning 700 feet south of the St. Louis Canal to the property's south end.

13. The affidavit of Respondent witness Floyd E. Milford, Jr., Registered Professional Engineer, engaged in engineering practice in Terrebonne Parish, states that in January, 1981, he prepared a contour map of subject bayou side property and adjacent properties. He alludes to the fact that Ashland Land Partnership developed without COE permit Addenda 1, 2 and 3 of Ashland Commercial Park Subdivision, where the elevation and drainage pattern is similar to Phases II and III. (This information is referred to in the Schorr letter, page 2, Respondent EX 34, where it is stated that Heck, in his mention

of Ashland Commercial Park, Addenda 1, 2 and 3, possibly had reference to Ashland North and Ashland Plantation South, which developments were constructed on property east of Louisiana Highway 57, not adjacent to Bayou Grand Caillou and not wetland.) He further points out Bayou Grand Caillou is non-navigable adjacent to subject property.

14. The affidavit of Respondent witness Mark Hester, Research Associate for Dr. Mendelssohn at Louisiana State University, states that he visited subject property on February 28, 1989, and that he is familiar with the affidavit of Dr. John D. Bruza, Jr. (see Finding 8, supra).

Upon Hester's visit to the site, much of the area had been filled and many of the trees and much of the understory vegetation had been removed. The vegetation he identified generally agreed with Bruza's identification although he found other species in the filled areas not necessarily indicative of wetland. He further stated that the remaining trees in subject area support the argument that the area had a history of being wetland since most of them are either obligate or facultative wetland species; the soils of Phase I appear to have been filled earlier than those of Phases II and III. He concludes that, in its present condition, almost all of Phase I and a considerable amount of Phase II is no longer functional as a wetland.

Conclusions of Law

1. Respondent is a person (33 U.S.C. 1362(5)).

2. The machinery referred to in Finding 5, supra, constitutes a "point source"; the placement of earth and vegetation on subject site resulting from the clearing and leveling activity of Respondent was a "discharge" of a "pollutant" (33 U.S.C 1362; Avoyelles Sportsmen's League Inc. v. Marsh, 715 F.2d 897, l.c. 922 (1983)).

3. On this record, the site of Respondent's clearing and and leveling activity was "wetland" which is a water of the United States (40 C.F.R. 122.2 - "Definitions").

4. The activities of Respondent in clearing and leveling subject site constituted a "discharge" of a pollutant from a "point source" into waters of the United States and engaging in such activities without a Section 404 dredge-and-fill permit was a violation of Section 301 (a) of the CWA, 33 U.S.C. 1311(a) (Avoyelles, supra, l.c. 922).

5. Respondent's removal of vegetation in wetlands area and redeposit of the material constituted a "discharge" within the meaning of CWA and the material discharged into wetlands was "fill material", i.e., "pollutants", under 40 C.F.R. 122.2, which discharge required a permit under the Act; furthermore, removal of vegetation constituted "dredging", since the vegetation was part of the wetlands (Avoyelles, supra, l.c. 922(17); U.S. v. Fleming Plantations, 12 ERC 1705, l.c. 1706).

6. In determining whether subject site is a wetland, it is proper, and EPA is required, to examine the soil, hydrology and the aquatic ecosystem to determine the effects of the proposed activity on the aquatic environment, as an interpretative application of the "wetlands" definition (40 C.F.R. 230; Avoyelles, supra, l.c. 914). Finding that subject property contains a growing proliferation of plant species requiring and tolerating saturated soil conditions for continued growth and reproduction corroborates further finding that subject area is a "wetland" (Fleming, supra, l.c. 1708, n. 12).

7. In enacting the Clean Water Act, Congress asserted federal jurisdiction over the nation's waters to the maximum extent allowable under the Commerce Clause of the U.S. Constitution (Leslie Salt Co. v. Froehlke, 578 F.2d 742 (1978); NRDC v. Calloway, 392 F.S. 685 (1975).

8. In 33 C.F.R. 328.3(a) (and 40 C.F.R. 122.2), "waters of the United States" is broadly defined to include

> (1) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide . . .
> (emphasis supplied.)
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> * * *
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> (7) Wetlands adjacent to waters . . . identified in paragraphs (a)(1) through (6) of this section.

9. Bayou Grand Caillou was definitely involved in past interstate commerce (C EX 45, page 3, paragraph 6).

10. Section 404(f)(2), 33 U.S.C. 1344(f)(2) provides that:

> Any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

DISCUSSION AND INTERLOCUTORY ORDER

I have determined that Complainant's Motion for Partial Summary Judgment should be and it is hereby granted. The subject property is, on this record, a "wetland", and it is adjacent to Bayou Grand Caillou, a waterway "used in the past and susceptible to use in interstate commerce" and is, thus, by definition provided in 40 C.F.R. 122.2 and 33 U.S.C. 1362(7), a "water of the United States" or "navigable water."

Respondent admits he had not received, prior to the deposition of fill material in and on said wetland, a permit from the Corps of Engineers, pursuant to Section 404 of the Clean Water Act, 33 U.S.C. 1344. Thus, he has violated Section 301 of the Clean Water Act, 33 U.S.C. 1311.

In the premises, I find and hereby ORDER that the Complainant has jurisdiction to assess a civil penalty for the said violation of Section 301 of the Clean Water Act, pursuant to Section 309(g) of the Act, 33 U.S.C. 1319(g).

It is further ORDERED that the requested hearing, scheduled to be convened in the U.S. Court of Appeals, West Courtroom (Room 265), 600 Camp Street, New Orleans, Louisiana, on Wednesday, April 12, 1989, beginning at 9:30 a.m., shall consider and determine whether the assessment of a civil penalty for said violation is appropriate and, if so, the amount of said civil penalty.

SO ORDERED.

DATED: March 21, 1989

Marvin E. Jones
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that the Original of the foregoing INTERLOCUTORY ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION was forwarded via Certified Mail, Return Receipt Requested, to Mrs. Carmen Lopez, Regional Hearing Clerk, Office of Regional Counsel, U.S. EPA, Region VI, 1445 Ross Avenue, Dallas, Texas 75202-2733; that a True and Correct Copy was forwarded in the same manner and to the same address to Counsel for Complainant, Pat Rankin, and a True and Correct Copy was forwarded in the same manner to Counsel for Respondent:

Alexander Crighton, III, Esquire
Post Office Box 4133
Houma, Louisiana 70360-4133;

all such Service effected this 21st day of March, 1989.

Mary Lou Clifton

Mary Lou Clifton
Secretary to Judge Jones